

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION**

UNITED STATES, §  
§  
§ Cr. No. C-04-423 (1)  
v. § C.A. No. C-05-384  
§  
DENNIS OSCAR GUERRA. §

**MEMORANDUM OPINION AND ORDER DENYING WITHOUT PREJUDICE  
MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE**

Dennis Oscar Guerra was sentenced in this criminal case by this Court on June 23, 2005. (D.E. 52). Final judgment was entered on June 30, 2005. (D.E. 53). Guerra timely appealed to the United States Court of Appeals for the Fifth Circuit. (D.E. 54). His appeal remains pending before that Court. See generally Docket in United States v. Guerra, Case No. 05-41044 (5th Cir.). Magistrate Judge B. Janice Ellington recently appointed substitute counsel to assist him in his appeal. (D.E. 66).

On August 1, 2005, the Clerk received from Guerra a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. (D.E. 67). This Court cannot address his § 2255 motion while his direct criminal appeal is pending. As the Fifth Circuit noted in Welsh v. United States: "A motion to vacate under 28 U.S.C. § 2255 will not be entertained during the pendency of a direct appeal, in as much as the disposition of the appeal may render the motion moot." 404 F.2d 333, 333 (5th Cir. 1968), abrogated on other grounds,

United States v. Ortega, 859 F.2d 327, 334 (5th Cir. 1988). Similarly, the outcome of Guerra's appeal may well moot the instant motion.

For the foregoing reasons, Guerra's § 2255 motion is DENIED WITHOUT PREJUDICE.

It is ORDERED this 10<sup>th</sup> day of August, 2005.

  
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HAYDEN HEAD  
CHIEF JUDGE